UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

FORTUNA ENTERPRISES, L.P.., a Delaware limited partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers and UNITE HERE, Local 11	Case Nos.: 31-CA-27837 31-CA-27954 31-CA-28011

CHARGING PARTY'S OPPOSITION TO RESPONDENT'S EXCEPTIONS

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Charging Party UNITE HERE Local 11 hereby submits its opposition to the exceptions filed Respondent Fortuna Enterprises, L.P. d/b/a The Los Angeles Airport Hilton Hotel and Towers ("Hotel, "LAX Hilton," or "Respondent") filed December 17, 2008.

STATEMENT OF THE CASE

On October 21, 2008, Administrative Law Judge John J. McCarrick ("the ALJ") issued his decision in this case ("The Decision"). The ALJ ruled that Respondent committed numerous violations of the National Labor Relations Act ("the Act") in response to the initial public organizing efforts of its employees during the Spring and Summer of 2006. Specifically, the ALJ found that Respondent violated Section 8(a)(1) of the Act by suspending 77 employees for engaging in a protected work stoppage on May 11, 2006; that it unlawfully interrogated employees about union or other protected-concerted activities; that it physically pushed and touched employees for engaging in protected-concerted activities; that it unlawfully threatened employees with violence if they engaged in protected-concerted activities; that it denied access to Respondent's facility and threatened employees with trouble if they entered the Hotel because employees wore union insignia; that it threatened employees with suspension if they participated in protected concerted activity; that it issued a warning to a female employee for engaging her co-workers to protest sexual harassment; and that it unlawfully threatened employees with other unspecified reprisals for engaging in union activity. The ALJ also ruled that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by issuing written warnings to five employees for engaging in union or protected activity.

Respondent has excepted to the ALJ's factual findings and legal conclusions in their entirety. While acknowledging that its supervisors have "arguably crossed the line" at certain times during the organizing campaign, *see* Employer's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("Respondent's Brief") p. 4, Respondent urges that the ALJ was mistaken that it crossed the line as relates to the allegations at issue in this case. The ALJ properly rejected Respondent's credibility challenges and legal authority in sustaining the large majority of the Complaint allegations. He based his decision upon a thoughtful consideration of the substantial record evidence and upon a proper application of controlling legal principles. The Board should deny the Respondent's exceptions because they are factually unsupported and legally incorrect.

ARGUMENT

I. THE ALJ CORRECTLY RULED THAT RESPONDENT ENGAGED IN UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8(A)(1) OF THE ACT

A. The March 3, 2006 Interrogation of Molina

The ALJ correctly found that Respondent, through supervisor Sous Chef Clifton Hibbert ("Hebbert"), unlawfully interrogated Cook Ricardo Molina ("Molina") when Hibbert asked Molina: "How was the meeting yesterday. Did you go to the meeting?" (D. 4, L. 24-38.)

Alberto ("Barajas") testified that on or around March 2, 2006, the union held a meeting. Barajas was present and saw Molina there. The next day, Hibbert (Barajas' and Molina's supervisor) questioned Molina about the meeting. "I was signing out for my lunch

and Ricardo Molina was cooking something on the broiler. Mr. Clifton came to him and asked him how was the meeting yesterday, did you go to the meeting." (Tr. 242.) Molina did not answer. (*Id.*)

The Board has ruled that questions such as "did you go to the union meeting" constitute coercive interrogation in violation of Section 8(a)(1) of the Act. *See, e.g., Contris Packing Co.*, 268 NLRB 193, 213 (1983) (questioning how the union meeting went was unlawful); *Nanticoke Homes, Inc*., 261 NLRB 736, 742 (1982) (finding query "Did you go to the union meeting?" unlawful); *Sealtest Foods*, 194 NLRB 856, 857 (1972) (same).

The Respondent excepts to the ALJ's determination that Barajas was a more credible witness than Hibbert. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 363 (3d Cir. 1951). Nor does the fact that Molina did not testify require the Board to set aside the AJL's correct finding that Barajas was the more credible witness. Hibbert's denials were unconvincing because he took overly deliberate pains to deny *everything*. Thus, despite seeing several union marches outside the hotel, Hibbert insisted he did not know employees were trying to organize a union. (Tr. 1142; 1146.) He claims to have heard no conversations about a union. (Tr. 1142.) He repeated he had "no idea." (Tr. 1146.) He assumed that the pickets were about the union, but he had no idea whether employees were involved in union organizing. (Tr. 1147.) This was so despite that he had conversations "every day" with Ricardo Molina and Alberto Barajas because he had "working together like for 20 years." (*Id.*)

The ALJ's decision to credit Barajas and discredit Hibbert was supported by substantial evidence. "Weight is given to the administrative law judge's credibility determinations because she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.'" *Shen Lincoln-Mercury-Mitsubishi, Inc*., 321 NLRB 586, 589 (1996) (quoting *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962)).

Second, Respondent faults the ALJ for relying upon Molina's testimony as inadmissible hearsay. Molina's testimony was not hearsay because he testified as to the statements of Hibbert, a supervisor of the employer. Hibbert's words constitute a verbal fact, and are not hearsay. Moreover, to the extent of the truth of Hibbert's statements is at issue, the statements constitute a non-hearsay admission of a party opponent under the Federal Rules of Evidence. Fed. R. Evid. 801. Respondent did not object to the testimony during the hearing. (Tr. 241.)

Third, Respondent argues that the fact Molina remained silent in the face of Hibbert's questioning demonstrates that it was not coercive. Respondent misstates the laws. The Board considers silence by an employee in the face of interrogation to be strong evidence of the coercive effect of the interrogation. *Camaco Lorraine Manufacturing Plant*, 353 NLRB No. 64 (2008); *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

The ALJ correctly ruled that Respondent violated the Section 8(a)(1) through Hibbert's unlawful interrogation of Molina.

B. The Coercive Pushing of Employees by Banquet Chef Pablo Burciaga

The ALJ correctly ruled that Banquet Chef Pablo Burciaga ("Burciaga") unlawfully pushed kitchen workers Antonio Campos ("Campos"), German Chan ("Chan") and Juan Banales ("Banales") to dissuade them from listening to co-workers complain to managers about a lack of kitchen equipment. The ALJ also correctly ruled that Rurciaga unlawfully shoved food server Michael Kaib ("Kaib") in the chest when he tried to intervene on their behalf.

Facts

On or around April 6, 2006, employees organized a delegation to meet with management over complaints that the kitchen and restaurant lacked equipment. They met with Assistant Director of Food and Beverage Manny Collera ("Collera") and Restaurant Manager Efrain Vazquez ("Vazquez") in the kitchen around 6 p.m. during a regular pre-shift meeting with wait staff. Kaib spoke on behalf of other employees. He requested permission to place piggy banks around the kitchen and restaurant to solicit funds to purchase equipment. (Tr. 65.) Collera and Vazquez replied they were not authorized to permit piggy banks. They did not ask any of the employees to leave the meeting, which was conducted peacefully. (Tr. 83.)

Campos, Chan and Banales listened to the meeting, which took place in an area of the kitchen where they were allowed to go. (Tr. 85.) Campos and Banales shared the belief that the kitchen lacked equipment. They had complained to Executive Chef Rolf Jung ("Jung") and were not satisfied with his response. (Tr. 93; 213.)

Burciaga approached Campos, Chan and Banales. He grabbed Chan and Banales by the shoulders and pushed them towards their work areas. (Tr. 217.) He then grabbed Campos and shoved him towards his work area. He used force that was "hard enough to take me by pushing me hard." (Tr. 67.)

Burciaga denied making contact with the employees, insisting that he came no closer than two feet away. (Tr. 1092.) But during an interview with Assistant H.R. Director Shelly Romo ("Romo") following the incident, Restaurant Manager Vasquez stated he saw Burciaga "grab" Campos. (Charging Party, Exh. 2.)

As Burciaga led the kitchen workers away, Kaib questioned what he was doing. Burciaga turned toward Kaib. He angrily told Kaib to shut up and to mind his own business. At the same time, he forcefully jabbed his index finger into Kaib's chest. (Tr. 68-69; 217.)

Burciaga admitted he told Kaib to shut up, but denied touching him. He incredibly maintained he was not even irritated at Kaib, despite that he does not typically tell employees to shut up. (Tr. 1096; 1095.) He also insisted he did not raise a hand towards Kaib, but that he kept his arms at his hips. (Tr. 1097.) Vazquez again contradicted Burciaga. He told Romo that he witnessed Burciaga raise his hand towards Kaib. (Charging Party, Exh. 2.)

After interviewing witnesses, Romo drafted a disciplinary letter indicating Burciaga had engaged in misconduct. (G.C Exh. 14.) The letter stated: "Should you violate this or any other policy of the hotel/company, further disciplinary action may occur, up to and including termination of employment." (*Id.*) Respondent did not issue the letter to Burciaga. Rather, it issued a sanitized letter that deleted any suggestion that Burciaga behaved inappropriately. (G.C. Exh. 13.) Trobaugh testified that she vetoed Romo's decision after looking over

"some" of the investigation because she considered it too strong. (Tr. 2126.) Respondent did not punish Burciaga.

Analysis

An employer violates Section 8(a)(1) if it assaults or otherwise physically abuses its employees in response to their protected activities. *Kenrich Petrochemicals*, 294 NLRB 519, 535 (1989) (pushing coercive); *Graves Trucking*, 246 NLRB 344 (1979), *enfd. in pertinent part* 692 F.2d 470 (7th Cir. 1982) (choking coercive); *Studio S.J.T. Limited*, 277 NLRB 1189, 1194, 1200 (1985) (raking nails across employee's back and snapping bra coercive); *Federated Stores*, 241 NLRB 240, 252 (1979) (seizing employee by arm and shaking fist coercive); *Greyhound Taxi Co*., 234 NLRB 865, 875 (1978); *Hot Bagels and Donuts*, 227 NLRB 1597, 1608 (1977); *Schultz, Snyder & Steele Lumber*, 198 NLRB 431, 434, 435 (1972). As an admitted agent of the employer, Burciaga's acts committed within scope of his general agency are attributable to the employer whether specifically authorized or not. *See Burnup & Sims, Inc.*, 256 NLRB 965, 965 (1981).

Burciaga engaged in several physical assaults. First, he grabbed Campos, Chan and Banales by the shoulders and pushed them away from the meeting. He did so because they were listening in on a meeting in which Kaib and others were complaining about working conditions.[1] Next, Burciaga jabbed his finger repeatedly into Kaib's chest. He did so because

[1] Respondent argues that Campos, Chan and Banales were not engaged in protected conduct because employees from other departments came to the meeting as well. Respondent's raises a red herring. If Respondent had disciplined employees from other departments based upon a uniformly enforced rule prohibiting their conduct, it might argue that *those* disciplines were

he wanted Kaib to shut up and not tell him that the kitchen workers had a right to listen to the meeting.

The ALJ was correct to reject Burciaga's transparently untruthful denials. (D. 5, n. 4). Not only do they contradict the credible accounts of the employee witnesses, they contradict Vazquez's statement that Burciaga grabbed Campos and raised his hand towards Kaib. Romo was clearly unconvinced after interviewing witnesses: she was prepared to issue Burciaga a disciplinary letter. Burciaga would have been disciplined except that Trobaugh came to his rescue.[2]

Finally, Respondent argues that Burciaga's conduct was "a legitimate effort to persuade employees to return to work." (Respondent's Brief, p. 8.) Respondent is wrong. Burciaga did not simply warn employees to return to work in accordance with a rule prohibiting discussions in the kitchen (there was no such rule). He physically shoved and poked employees in violation of Respondent's rules. (*See* Res. Exh. 28, p. 64, Rules 3 -7). The ALJ was correct in finding that Burciaga's conduct violated Section 8(a)(1).

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not unlawful as to *those* employees. But Respondent identified no rule that prohibited Campos, Chan and Banales from listening to a discussion being held in the kitchen near their work area. Kaib—a waiter—was obviously permitted to attend a pre-shift meeting for waitstaff. The subject matter of the meeting—the lack of kitchen and restaurant equipment—clearly concerned terms and conditions of employment.

[2] The fact that Romo did not believe Burciaga constitutes an admission by Respondent as to Burciaga's credibility. The fact that Respondent chose not to punish Burciaga shows it condoned his misbehavior. A finding of condonement, however, is not necessary to sustain the violation.

C. The Threat to Employee Campos

About 30 minutes after the incident with the kitchen workers and Kaib, Burciaga approached Campos. Burciaga threatened Campos that if he ever saw employees speaking to Campos in his work area he was going "to fire them to shit along with you." In his prior affidavit, Campos gave the same account, which was translated as follows: "[I] they are in a group in front of me in my station, what are you going to do. Burciaga said I will kick their asses out of here, including you." (Tr. 100.) [3]

The ALJ correctly ruled that Burciaga's threat violated the Act. Having already engaged in unlawful physical assaults, Burciaga threatened Campos with more of the same if Burciaga saw employees in Campos work station. The ALJ correctly discredited Burciaga's denials. Burciaga had already shown himself to be an untruthful witness concerning prior events. Moreover, he was overly careful to testify regarding his certainty that he had no further conversation with Campos the entire day about any matter. (Tr. 1037; 1099.) That blanket denial lacked credibility. The ALJ's ruling was based on substantial evidence. Respondent's exceptions should be denied.

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[3] As the interpreter pointed out, the Mexican Spanish term "*la chingada*" has a wide array of meanings (including *chingar*, which means to "fuck")—all of which can be aggressive and coercive according to the context. (Tr. __.) Campos' affidavit given originally in Spanish to agents of Region 31 states that Burciaga told Campos that he would "kick their asses out of here." Both renditions are consistent with Burciaga's threatening attitude and prior physical aggression. (Tr. 71.)

D. The April 2006 Chriss Draper Interrogation and Threat

The ALJ correctly ruled that Supervisor Chriss Drapper ("Drapper") unlawfully interrogated Yazmin Ortiz concerning her participation in a delegation. For the reasons set forth in the Decision, the ALJ's findings and conclusions were based on substantial evidence and should be upheld.

E. The April 21, 2006 Union Paraphernalia Issues

The ALJ correctly found that Respondent violated Section 8(a)(1) by barring employees from entering the Hotel wearing union t-shirts and by threatening employees with trouble should they do so.

In April 2006, Banquet servers Beatriz Reyes ("Reyes") and Ana Mendez ("Mendez"), together with other employees, attempted to enter the Hotel on their day off to collect paychecks. They had come from a union rally and were wearing t-shirts that said UNITE HERE. As they attempted to access the loading dock door (which they customarily used to enter the hotel), they were confronted by Security Guard Daisy Arguenta ("Arguenta"). Arguenta recognized Reyes as an employee. (Tr. 995.)[4]

Arguenta announced that the employees could not enter the hotel wearing union t-shirts. (Tr. 991; 933.) She threatened that employees would "have problems" if they did so. (Tr. 994; 933.) To enter the Hotel, employees were forced to find an alternative entrance.

[4] Respondent did not call Arguenta as a witness.

Respondent has no rule pertaining to the articles of clothing an employee may use when entering in an off-duty status. (Tr. 999.) To the contrary, Reyes and Mendez have entered the same door wearing t-shirts and jeans on numerous occasions. (Tr. 934-936.)

Respondent unlawfully interfered with employees' Section 7 rights when Arguenta barred them from entering the Hotel and warned them they could have trouble for doing so. Absent special circumstances, prohibitions on employees from wearing union insignia at work violate the Act. Moreover, the burden of proof is on the Employer to justify such a prohibition. *Albertson's Inc*., 319 NLRB 93, 102 (1995); *Mack's Supermarkets*, 288 NLRB 1082, 1092 (1988). Here, Respondent presented no evidence supporting an argument that "special circumstances" exist for prohibiting employees from wearing union t-shirts.

Respondent argues that the violation was *de minimus* because Arguenta only prevented employees from entering for a "couple of minutes." (Respondents Brief, p. 12.) It relies on *Yellow Ambulance Services*, 342 NLRB 804 (2004), which ruled that the impact of requiring a new application form from union supporters desiring to switch from full-time to part-time was not material. That case is inapposite because it addresses entirely separate employer conduct. Here, the interference with access was combined with a threat of unspecified reprisal. That threat was not mitigated simply because Arguenta did not immediately make good on it or because the employees found an alternate means to enter the Hotel.

The ALJ correctly found that Respondent violated Section 8(a)(1) by barring and threatening employees wearing union insignia.

F. The May 11, 2006 Chriss Draper Threat of Suspension

The ALJ correctly ruled that Draper threatened Cashier Whitney Johnson with suspension on May 11, 2006 when he told her: "Whitney, the Union is downstairs at the employee cafeteria. If you go down there, you will get a suspension, and I don't want to do that." (Tr. 925.) As discussed in Part J, infra, the May 11, 2006 work stoppage was protected activity at all times. Draper's threat of discipline for engaging in or supporting the work stoppage was unlawful.

Draper denied threatening to suspend Johnson and he denied knowing that there was an ongoing work stoppage. Johnson's straightforward and specific testimony was ore credible than Draper's vague denials. Furthermore, the fact that other supervisors of the Respondent were suspending employees in the cafeteria at the same time that Draper threatened Johnson makes the allegation all the more credible. In telling Johnson not to go down to the cafeteria, Draper was carrying out his employer's intention to prohibit employees from engaging in the strike.

The ALJ correctly ruled that Respondent violated Section 8(a)(1) when Draper threatened Johnson with suspension if she went to the cafeteria.

G. The May 11, 2006 Rogelio de la Rosa Threat of Suspension

The ALJ correctly ruled that Chief Steward Rogelio de la Rosa threatened Fidel Andrade with suspension if he saw Andrade with the employees engaged in a work stoppage, he would suspend Andrade. As discussed in Part J, *infra*, the May 11, 2006 work stoppage was protected activity at all times.

The ALJ's finding was based upon a statement written by De la Rosa acknowledging that he threatened to suspend Andrade. (G.C. Exh. 8.) In response, Respondent attacks the

admissibility of Exhibit 8. But Respondent did not object on any basis to the admission of the document at trial. Further, De la Rosa's statement is a non-hearsay admission of a party opponent, and is therefore not subject to a hearsay objection. Fed. R. Evid. R. 801. Finally, while Respondent contends that De la Rosa's statement alone is insufficient to prove the violation, Respondent failed to call De la Rosa to refute, deny or otherwise explain his statement. The ALJ was justified in relying upon De la Rosa's admission in support of the violation.

H. The May 11, 2006 Ana Samayoa Threat of Suspension

The ALJ correctly ruled that the Employer violated Section 8(a)(1) of the Act when Housekeeping Director Anna Samayoa ("Samayoa") threatened St. Wenceslaus Lawrence ("Lawrence") with suspension if he stayed in the cafeteria with his fellow employees. As discussed in Part J, *infra*, the May 11, 2006 work stoppage was protected activity at all times. Therefore, the threat of suspension for engaging in or supporting the work stoppage was unlawful.

I. The June 2006 Banquet Manager Charles Perera Threat

The ALJ correctly found that in Banquet Manager Charles Perera ("Perera") threatened Reyes with unspecified reprisals if she talked about the union at the Hotel. Reyes had a conversation with Perera inside his office. Perera told Reyes that he wanted to tell her something "as friends." Reyes testified: "He say he don't have any problems with me because I good worker, but if I don't want to have any problems, that it's better don't talk about the union inside in the hotel." (Tr. 996.) Perera did not testify.

Respondent relies on *Sunnyvale Medical Clinic, Inc*., 277 NLRB 1217 (1985) to argue that Perera's prediction of "problems" was casual and friendly, and therefore non-coercive. Respondent's argument is flawed. First, unlike the situation in *Sunnyvale Medical Clinic, Inc*., there was no evidence that Reyes and Perera were friends. The fact that Reyes prefaced his threat by saying he was speaking "as friends" does not establish that he and Reyes were, in fact, friends. Reyes testified that they were not. (Tr. 1004) Second, unlike the situation in *Sunnyvale Medical Clinic, Inc*., Respondent had a history of hostility towards unionization and, as the ALJ correctly found, unlawfully suspended 77 employees on May 11, 2006, (*see* Section J, *infra*), and unlawfully disciplined five employees in June 2006 (see Part II, *infra*). Finally, Perera's threat that Reyes might face "problems" was inherently more coercive than the supervisor's inquiries in *Sunnyvale Medical Clinic, Inc*., where the supervisor merely inquired of a friend regarding the reasons she supported the union.

The ALJ correctly ruled that the Respondent violated Section 8(a)(1) when Perera threatened Reyes with problems if she talked about the Union at work.

J. The May 11, 2006 Suspension of 77 Employees

The ALJ ruled that Respondent violated Section 8(a)(1) when it suspended 77 employees for their participation in a work stoppage in the cafeteria to protest the discharge of a co-worker on May 11, 2006. The ALJ correctly applied the Board's analysis set forth in *Quietflex Manufacturing, Inc.,* ("*Quietflex*") 344 NLRB 1055 (2005) to conclude based on the facts of this case that the employees' work stoppage was protected and hence the suspensions were unlawful.

Facts

On May 10, 2006, Respondent suspended food server Sergio Reyes ("Reyes") pending an investigation into alleged misconduct. (Tr. 406-408.) Reyes was a leader in the organizing efforts. His suspension alarmed union supporters, who worried that Respondent might also discipline them for union activities. (Tr. 409.) Patricia Simmons ("Simmons") testified: "I told [co-workers] what happened with Sergio and that, you know, they were doing these things just to the people who were pro-union and that they were going to try to suspend us, or, you know, retaliation." (Tr. 409.) Miguel Vargas ("Vargas") testified: "Several of the co-workers were upset of the fact that the company had suspended Sergio, and they felt that—they came to me and expressed their concerns that if it happened to Sergio, who was outspoken, it could happen to any one of us." (Tr. 283.)

Simmons, Vargas and other workers discussed meeting with management to express their grievance over Reyes' discharge. Simmons testified: "we wanted to talk to the management to see, you know, why this happened and exactly what—you know, we want to have some answers." (Tr. 411.) Vargas testified: "I believe I called a couple of my coworkers expressing that concern of our jobs, and basically everybody was concerned that if they did that to him, they can do that to anybody else in the hotel." (Tr. 283.) Housekeeper Lilia Magallon ("Magallon") testified: "since the coworker that was suspended had been part of another delegation we have made we wanted to know because as he was suspended they were going to continue suspending the rest of us." (Tr. 626.)

Employees decided to congregate in the cafeteria the next morning to insist on a meeting with hotel manager Grant Coonley ("Coonley"). They chose the employee cafeteria to avoid disruption to Respondent's operations. (Tr. 285; 414.) Respondent became aware of

the workers' plans early that morning. At 6.45 a.m. Assistant Housekeeping Manager Jose Cano ("Cano") called Food and Beverage Director Tom Cook ("Cook") to inform him that employee Mike Kaib was telling employees that they should walk out at 8 a.m. (G.C. Exh. 12; Tr. 1575.) Supervisor Patricia de la Torre made the same report. (G.C. Exh. 12.) By Cook's admission, the work stoppage "didn't come as a surprise." (Tr. 1575.)

The events of the work stoppage are largely undisputed. The versions of the general Counsel's and Respondent's witnesses will be summarized separately.

1. Employees' Version of Events

Employees from various departments started arriving at the cafeteria shortly after 8 a.m. As he left the Café where Reyes had been employed, Vargas told Cook that he should come hear employees' concerns. Cook stated he would not. (Tr. 285.)

Upon arriving at the cafeteria, Simmons and Vargas told a security guard they needed to speak with Coonley. (Tr. 416.) Director of Housekeeping Samayoa arrived accompanied by Cano and Assistant Security Director Luis Gallardo ("Gallardo"). (Tr. 288.) Samayoa told employees that if they were not working they needed to go home. (Tr. 288.) Shortly thereafter, she told employees that if they did not return to work, they would be suspended. (Tr. 289.)

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Vargas explained to Samayoa that workers needed to speak to Coonley about Reyes.

A. I told her that she needs to go back and try and locate Mr. Coonley because he lives on the property and I believe he has a cell phone like everybody else.
Q. Did you tell Director Samayoa what you wanted from Mr. Coonley?
A. Yes. For him to come down and to speak to us on concerns of the coworkers that had been suspended.
Q. Did Director Samayoa reply?
A. She said she'll try or she'll see. She said in effect I'll see or I'll try.

(Tr. 289.) Patricia Simmons testified, "Miguel . . . said that we wanted to talk to the manager because we wanted to talk about Sergio, what happened to our coworker, and we needed to talk to the General Manager." (Tr. 418.)

After about 8.30 a.m., Simmons tried to contact management herself. First, she called hotel owner's David Hsu. (Tr. 420.) Simmons spoke with Hsu's assistant and told her that "we were there to talk to the managers and that nobody is available because we want to talk about our coworker." (Tr. 422.) The assistant told her to call Human Resources, which did not open until 9 a.m.[5] (Tr. 423.)

Simmons called Human Resources at 9 a.m. She spoke with assistant Ayesia and explained she needed to speak with Human Resources Director Sue Trobaugh (Trobaugh") about a co-worker who had been suspended. (Tr. 426.) Ayesia responded that Trobaugh was not available, but that somebody would call back. (Tr. 426-427.) Nobody did. At 9.20 a.m., Simmons called Human Resources again. She let the phone ring many times, but nobody answered. (Tr. 428-429.)

[5] However, Trobaugh had been on site since before 8:30 a.m. (Tr. 2070)

Shortly before 9 a.m., Samayoa, Gallardo and Cano returned to the cafeteria and started suspending employees. Cook Alberto Barajas ("Barajas") testified:

A. And then she came back with Jose Cano, her assistant, and with Luis Gallardo, a night manager.
Q. And what, if anything, did they do?
A. I know Samayoa told us to go back to work or she will suspend us.
Q. Did Mr. Cano or Mr. Gallardo do anything?
A. Yes.
Q. What did they do?
A. They started writing.
Q. Do you know what they were writing?
A. Ana Samayoa told them to write names.
JUDGE MCCARRICK: You heard her say that?
THE WITNESS: Yes.
BY MR. LAKS: In what language did Ana speak?
A. In English.
Q. Okay. So you saw Mr. Gallardo and Mr. Cano writing?
A. They were writing.
Q. And what, if anything, did Director Samayoa do then?
A. She was suspending everyone individually.
JUDGE MCCARRICK: How did she go about doing that?
THE WITNESS: We all have nametags, so when was talking to everyone personally. She told me also I was suspended.
BY MR. LAKS: She told you personally?
A. Yes, she did.

(Tr. 246.)

Houseman Lawrence testified that he went to the cafeteria at a little before 9 a.m. for a coffee break. Three or four minutes after he arrived, Samayoa approached him. "She was pointing her finger toward me and she came across and asked me, 'Lawrence, if you stay here any longer, you will be suspended for the rest of the day.' (Tr. 954.) Lawrence began to explain that he was on his break, but Samayoa "just walked off. She didn't have time to reply." (Tr. 955.)

Vargas observed that housekeepers started moving towards the corners of the cafeterias as Samayoa pointed her finger at them. Vargas told Samayoa that "she needed to stop intimidating the coworkers and she should focus on contacting Mr. Coonley." (Tr. 304.)

Employees continued to wait for a response from management, but none came. (Tr. 306.) Vargas sought De la Rosa's help to tell Coonley that employees wanted to go back to work if Coonley would not speak with them. "I asked for his help in trying to locate Mr. Grant Coonley. I let him know that since we hadn't had any response from management that we were ready to return to work and if he could relay that message to Mr. Tom Cook. . . .We waited for an answer from Rogelio or anyone else, but we didn't get it." (Tr. 306.) Magallon corroborated this testimony. (Tr. 593; 622.)

Employees formed a delegation to notify management that they were ready to return to work in light of management's refusal to communicate. Simmons testified: "We talked about this time, you know, that we were waiting a long time and we wanted to go back to work, so we said we wanted to send somebody upstairs from the delegation so we can talk to the managers and tell them that we wanted to go back to work." (Tr. 430.) Vargas testified: "Since we didn't get no answer, me and my coworkers formed a committee basically of about 10 or 11 members of coworkers, and we decided to go upstairs to the lobby and try to talk to Thomas Cook or anybody and let them know that we were ready to return to work since nobody came down. . . . Basically we decided that since time has passed by that we needed to go upstairs and let them know that we're ready to return to work since there was no answer from management." (Tr. 307.)

The delegation left the cafeteria shortly after 10:00 a.m. to find Cook. They arrived at the service area located between the kitchen and the restaurant via a non-public stairway. (Tr. 307-308.) Supervisor David Aragon approached them. (Tr. 308.) Vargas testified:

A. I recall telling him that since nobody heard our concerns downstairs, we were ready to return to work and if he could relay the message to Mr. Tom Cook that we were ready to return to work.
Q. Did Mr. Aragon reply?
A. He said yes.
Q. And what did he do?
A. He turned around and he walked into the restaurant.
Q. Were you able to see what he was doing?
A. Yes. I saw him walking toward Mr. Tom Cook who was setting up a table.
Q. All right. And what happened then?
A. He spoke. David spoke to Mr. Tom Cook and then returned to us.
Q. To you?
A. Yes.
Q. And after Supervisor Aragon returned to you, was there some conversation?
A. Yes. Mr. Aragon told us that we were suspended and we couldn't return to work.

(Tr. 309-310.)

Executive Chef Rolf Jung ("Jung") arrived and told two kitchen workers in the delegation that they were suspended. (Tr. 310). Collera, Samayoa, Security Director Graham Taylor ("Taylor") and a police officer arrived. Vargas told them "we were ready to return to work since management had not met with us." (Tr. 312.) The managers responded they could not return to work because they were suspended. (Tr. 312.) The delegation returned to the cafeteria. (Tr. 313.) Vargas told his co-workers that they were all suspended and that they had to leave. The employees left the cafeteria peacefully.

2. Respondent's Version of Events

Samayoa and Cano joined Gallardo at 8.12 a.m. outside the cafeteria. Gallardo explained that the employees "want to speak to the general manager or Tom Cook." (Tr. 1878.) At 8.15 a.m., Samayoa, Gallardo and Cano entered the kitchen service area.[6] (Tr. 1879.) Samayoa saw Simmons standing by the phone. Simmons explained that the employees were waiting for Cook to come speak to them. (Tr. 1880.) Samayoa called Cook's office but he did not answer. (Tr. 1884.) Samayoa and the other supervisors waited for Cook. (Tr. 1886.)[7]

Just before 8:30 a.m., Samayoa, Cano and Gallardo entered the main seating area of the cafeteria. Just before 8:30 a.m., Gallardo spoke with Trobaugh by telephone. Trobaugh told him that Samayoa should tell employees that if they were not on break, they needed to go back to work. (Tr. 1893.) Samayoa, Cano and Gallardo entered the cafeteria, and so told employees. (*Id*.) Samayoa testified that the employees listened to her. (*Id*.) She did not have to shout over them. (*Id.*) Vargas and Simmons insisted that employees would not go back to work until they had spoken with Coonley or Cook. (Tr. 1895.) Samayoa left the main seating area at about 8:35 a.m. and returned to the kitchen service area. (Tr. 1898; R. Exh. 25.)

Gallardo spoke again with Trobaugh by telephone. Trobaugh wanted employees told again that if they were not on break they need to go back to work or go home. (Tr. 1901.)

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[6] The kitchen area and the main seating area of the cafeteria were not connected by a doorway. Rather, one has to exit the kitchen to the hallway, and then enter the cafeteria seating area.

[7] Cook knew that employees wanted to speak with him. He wrote in a report: "At approximately 8:10 a.m. I received a call from Security that I was wanted in the cafeteria. I did not go to the cafeteria." (G.C. Exh. 12.)

Samayoa entered the cafeteria area a second time at about 8:44 a.m. and so told them. (Tr. 1903.)

Gallardo spoke with Trobaugh a third time. Trobaugh wanted Samayoa to threaten employees with suspension if they did not leave the cafeteria.. (Tr. 1905.) At 8.53 a.m., Samayoa and Gallardo entered the main seating area a third time. (Tr. 1906.) Gallardo testified: "[Samayoa] told them once again I want to let you know that if you're not on break, you need to go back to work. If you refuse to go back to work, you need to swipe out and go home. And if you refuse to do that, then we're going to start suspending individually one by one." (Tr. 1638.)

At 8.57 a.m., Samayoa left the cafeteria and discussed matters with Gallardo and Cano. (Tr. 1906.) Gallardo told Samayoa that Trobaugh wanted her to start suspending employees. (Tr. 1908.) Samayoa entered the cafeteria at 9 a.m. (R. 25.) Samayoa testified: "I started suspending them one-by-one." (Tr. 1909.) Gallardo commenced writing the names of the suspended employees in a notebook. (Tr. 1909; Res. Exh. 20.) Some employees started "running away." (Tr. 1644; 1910). At 9.06 a.m. Director of Security Graham Taylor entered the cafeteria. (Tr. 1916.) He threatened to have employees arrested for trespassing. (Tr. 1917; 1653.)

Cook testified that a delegation of employees arrived to speak with him. He offered inconsistent accounts of how he knew that employees wanted to speak to him. He testified two times that an employee relayed the message to him. (Tr. 1552, 1554.) Subsequently, he claimed that the employees told him directly while his back was turned. (Tr. 1554). He could not recall whether Aragon told him that employees wanted to go back to work. (Tr. 1584). He did not speak to employees. (Tr. 1556.)

Cook left the cafeteria and went to H.R. afterreceiving a telephone call from Trobaugh. Trobaugh told Cook that employees had been suspended because "they were given the opportunity to come back to work and that they had refused, so they were suspended." (Tr. 1587.) Trobaugh also announced the reason that the employees were in the cafeteria:

> Q. While you were in the HR department, did anyone tell you why the employees had gathered in the cafeteria?
> JUDGE MCCARRICK: That just calls for a yes or no answer.
> A. BY THE WITNESS: Yes.
> Q. Who told you?
> A. I believe it was Sue.
> Q. And what did she tell you?
> A. She said that they wanted to speak with somebody regarding a team member that had been terminated.

(Tr. 1596). Cook testified that, despite having to cover restaurant service with temporary help, "we did ok and the guests were not upset." (G.C. Exh. 12; Tr. 1581).

In summary, according to Respondent's timeline, employees arrived at the cafeteria between 8:05 and 8:12 a.m. Samayoa threatened employees with suspension at 8.53 a.m. Samayoa started telling employees they were suspended shortly after 9 a.m. The employee delegation left the cafeteria to speak to Cook at 10.15 a.m. and returned to the cafeteria at 10.40 a.m. The employees left the cafeteria at 10.45 a.m. (Res. Exh. 25.)

Analysis

The U.S. Supreme Court has ruled that an in-plant work stoppage by unrepresented workers can constitute concerted activity protected under § 7 of the Act. *See N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962). The Court wrote:

> Having no bargaining representative and no established procedure by which they could take full advantage of the unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not require to make any more specific demand than they did to be entitled to the protection of § 7.

Id. at 15.

In *Quietflex, supra*., the Board surveyed prior decisions to explain the scope of the protection afforded to in-plant work stoppages by § 7. The Board observed that "the precise contours within which such [a work stoppage] is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed." 344 NLRB at 1057 (quoting *Waco, Inc*., 273 NLRB 746 (1984). The Board identified ten queries relevant to the analysis:

> (1) the reason employees have stopped working;
> (2) whether the work stoppage was peaceful;
> (3) whether the work stoppage interfered with production, or deprived the employer access to its property;
> (4) whether employees had adequate opportunity to present grievances to management;
> (5) whether employees were given any warning that they must leave the premises or face discharge;
> (6) the duration of the work stoppage;
> (7) whether employees were represented or had an established grievance procedure;
> (8) whether employees remained on the premises beyond their shift;
> (9) whether the employees attempted to seize the employer's property; and
> (10) the reason for which the employees were ultimately discharged.
>
> *Id.*

As hereafter shown, the ALJ correctly applied the *Quietflex* factors in ruling that the May 11, 2006 work stoppage was protected at all times and that Respondent violated Section 8(a)(1) when it suspended the 77 employees in response. Respondent's exceptions are based on a gross distortion of the factual record and a flawed application of legal principles to the record. The exceptions should be denied.

1. The reason the employees have stopped working**.**

The ALJ correctly found that employees engaged in protected activity by protesting the suspension of a fellow employee. (D. 15, L. 8-11.) Employees were concerned that Respondent disciplined Reyes—an open union supporter—based on accusations of theft that were merely pretexts for anti-union discrimination. They were concerned that they might suffer the same consequence for exercising their § 7 rights. (Tr. 283; 409; 626.)

It is well established that a work stoppage in protest of the discharge of a fellow employee is protected, s*ee TKC*, 340 NLRB 323, 325 (2003), and that the lawfulness of the discharge is irrelevant to the protected nature of the work stoppage. *Pepsi Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970). In *Pepsi Cola Bottling Co*, employees staged an in-plant work stoppage to protest the discharge of six other employees. *Id.* at 478. The work stoppage was protected notwithstanding that the discharge of the six employees was non-discriminatory:

> The sit-in here lasted only a few hours and did not extend beyond the employees' normal working hours, and no employees sought to bar or exclude company officials. Nor does the fact that it was undertaken as a protest against the non-discriminatory discharges of other employees, rather than against unfair labor practices committed by the Employer, transform the in-plant cessation of work into an illegal sit-down strike.

Id. This is a clearly established Board law. *See, e.g., John S. Swift & Co.*, 124 NLRB 394, 397-398 (1959*), enf. in rel. part,* 277 F.2d 641 (7th Cir. 1960) (stating that "the protest of a lawful discharge is protected activity."); *G & H Products, Inc*., 261 NLRB 298, 306 (1982), *enf. denied on other grounds,* 714 F.2d, 1397(same); *Globe Wireless, Ltd*., 88 NLRB 1262, 1265, *enf'd*. 193 F.2d 748, 750 (9th Cir. 1951)(same).

In response to this clear Board law, Respondent relies on *AHI Machine Tool & Die, Inc. v. NLRB,* 432 F.2d 190 (1970), in which the Sixth Circuit denied enforcement of the Board's ruling in *Allen Hayosh Industries, Inc*., 176 NLRB 57 (1969). The court ruled that employees who struck to protest the discharge of a co-worker for slugging a supervisor were not engaged in protected activity because the strikers could not have held a "good faith but mistaken belief" that the co-worker's discharge was unlawful. 432 F.2d at 197. The NLRB has never adopted this subjective test for analyzing the protected status of employees' concerted activity. Doing so would render the protected status of a strike contingent upon the subjective beliefs of the strikers. Moreover, even assuming that the employees in *AHI Machine Tool & Die, Inc.* could have had no good faith belief that the discharge of their co-worker for slugging a supervisor was unlawful, the same assumption cannot apply here. Employees could reasonably have believed that Respondent made unfounded allegations against Reyes (a union leader) as a pretext for retaliating against his protected activity. In fact, that is what the uncontroverted evidence shows that they believed. (Tr. 283; 411; 626.) In contrast, Respondent's theory relies on the false premises that 1) employees should have believed Respondent's accusations against Reyes to be true (even before Respondent determined that, in its view, they were true); and 2) employees could not have disagreed with

Respondent's conclusions in good faith.[8] Respondent's argument for overturning clearly established Board law is meritless.[9]

2. Whether the work stoppage was peaceful.

The ALJ correctly ruled that there was no dispute as to the peacefulness of the work stoppage. In *NLRB v. Fansteel Metallurgical* Corp., 306 U.S. 240 (1939), the Supreme Court ruled that striking workers were engaged in an unprotected strike when they seized and held their employer's property for several days, battled police seeking their eviction, and violated a court order that they surrender the premises. But in *Golay & Co*., 156 NLRB 1252 (1966), the Board distinguished the violence in *Fansteel* from the peaceful, lawful presence of striking employees on an employer's premises:

> We find no merit in Respondent's contention that the work stoppage we are concerned with here was an illegal sitdown strike involving a plant seizure as in *Fansteel*. The fact that the striking employees loitered or wandered about the plant for 1/2 to 2 hours while awaiting a decision on rectifying the illegal discharge of Paul Paris, does not, in our considered judgment, constitute a plant seizure. There is no evidence of any violence and no resort to, or threat of, physical force by the strikers to enforce their demands. Respondent was not denied access to the property; plant operations, although somewhat curtailed in this particular plant, were not completely shut down as in *Fansteel*; and it is

[8] Despite its self-gratifying rhetoric throughout its Brief, Respondent's accusations against Reyes have never been proven to be true. But their truth is irrelevant to the protected nature of the work stoppage.

[9] Respondent misleadingly cites *Waco, Inc*., 273 NLRB 746 (1984) and *Cone Mills Corp.*, 413 F.2d 445 (4th Cir. 1969) as further support for its argument. The determination that the work stoppages in those cases was not protected did *not* turn on the nature of the underlying disciplinary action that the strikers were protesting.

> clear that the "loitering" did not interfere with production to any greater extent than did the simple cessation of work by these employees.

Id. at 1261-1262.

The employees conducted themselves peacefully at all times on May 11, 2006 (Tr. 598.) There is no evidence they "seized" the cafeteria or interfered with the right of any employee to access it. They engaged in no violence, threat of physical force or destruction. Their objective was to communicate concerns to management. When it became clear that management refused to hear those concerns, they attempted to return to work.

Respondent argues that the work stoppage was not truly "peaceful", a term which it reads from the dictionary to mean "untroubled by conflict, agitation or commotion." But *Quietflex* does not require that strikers conduct themselves with Zen-like tranquility. The Board used the term "peaceful" in contraposition to the violence, destruction of property, and threat of force that characterizes unprotected strike activity.

But even under its proposed definition, Respondent is forced to distort the testimony and ignore its own witnesses' admissions to bolster its rhetoric. For example, Respondent fails to reckon with Samayoa's testimony that employees listened to her when she spoke with them and that she did not have to shout to be heard (Tr. 1893.) Indeed, she acknowledged that Vargas was "very polite" when speaking on behalf of workers. (Tr. 1877.) Respondent avers that employees chanted and clapped, but fails to address the fact that employees have frequently used the cafeteria for even louder celebrations and raffles with Respondent's approval. It was less noisy than when Respondent used the cafeteria for large group events focused on safety, and on par with the regular noise of the cafeteria during normal use. (Tr. 701; 702; 703-707; 708.) Respondent also contends that employees insisted they would not

move, but that argument is specious. Employees obviously do not lose the protection of the Act simply by declaring that they will not desist from engaging in protected activity. Finally, Respondent claims that the strikers never vocalized to management reason for their protest. As discussed below in subsection 4, that version of events not only ignores Vargas and Simmons' credible testimony that they explained to Samayoa the reason for their work stoppage, it also fails to account for Cook's admission that Trobaugh explained to him that morning the reason for the work stoppage (Tr. 1596.) Respondent's exceptions to the finding that the work stoppage was peaceful are meritless.

3. Whether the work stoppage interfered with production or deprived the employer access to its property.

The ALJ correctly determined that there was no evidence that the work stoppage interfered with production or deprived the employer of access to its property, including the cafeteria. The ALJ also correctly concluded as a matter of law that it is not considered an interference with product where employees do no more than withhold their own labor. *Quietflex, supra,* n. 6.

In assessing whether a work stoppage interferes with production, the Board draws a distinction between interference with production caused by employees withholding their own labor versus interference caused by the physical presence of striking employees on the employer's property. Only the latter interference is relevant to the analysis. *See Quietflex*, 344 NLRB at n. 6; ("It is not considered an interference of production where the employees do no more than withhold their own services."); *Golay & Co.*, 156 NLRB at 1262 (ruling that "the 'loitering' did not interfere with production to any greater extent than did the simple

cessation of work by these employees;"); *see also City Dodge Center*, 289 NLRB 194 (1988) *enf'd sub nom. Roseville Dodge Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

The rationale for this distinction is obvious. The fact that a striking employee interferes with production solely by absenting himself from the job cannot by itself deprive a work stoppage of its § 7 protection. Striking employees withhold their services for no other purpose than to interfere with production as a protected means of pressuring their employer. To accept the argument that a strike should lose its protection because the absence of employees from their jobs has disrupted production would lead to the absurd rule that a strike is unprotected simply to the extent that it is effective. The Board clarified in *Quietflex* that it rejected that result. Respondent's argument concerning the negative impact on its business caused by the absence of striking housekeepers, food servers and kitchen workers is irrelevant.

But even if Respondent's theory were valid, Respondent failed to provide evidence to substantiate its rhetoric concerning interference with production. The ultimate assessment of the impact of the strike on the operation of the restaurant came from Cook. He reported on the day of the event: "We did ok and the guests were not upset." (G.C. Exh. 12; Tr. 1581). That hardly suggests the kind of apocalyptic systems failure that Respondent describes in its Brief. Furthermore, as the ALJ noted, while Respondent suggests it had to cover 500 rooms needing cleaned, it failed to present evidence as to how many rooms it was actually unable to clean. Finally, Respondent caused its own labor shortage when it refused to accept employees' offer to return to their jobs. While taking pains to insist that it only suspended the employees "pending investigation," Respondent could have investigated while permitting housekeepers to clean rooms if circumstances were so dire. In sum, while Respondent's

theory that a strike should be deemed unprotected to the extent it is effective defies clear Board law, *see Quietflex, supra.*, n.6, Respondent failed even to show why that theory should apply in this case.

On the other hand, it is relevant under *Quietflex* to consider whether the physical presence of employees in the cafeteria on May 11, 2006 substantially interfered with Respondent's ability to use its cafeteria.[10] Respondent argues that the work stoppage interfered with production because it deprived other employees of access to the cafeteria and it allegedly forced Respondent to set up a temporary employee dining room in the Café. That in turn required the relocation of a scheduled event to a different locale and curtailed the space available for employees to eat.

Respondent failed to prove that the presence of employees in the cafeteria created any more than a speculative interference with its use of its property. First, the cafeteria did not open for hot meal service until 10.30 a.m. From 8 a.m. until 10.30 a.m., only coffee, bread and other self-serve items were available. (Tr. 474.) By that time, employees had repeatedly communicated their intention to return to work and leave the cafeteria. The credible testimony of participants in the work stoppage established that not all the tables were occupied and there was no evidence that workers attempted to interfere with anyone's use of the facility. (Tr. 626; 695.) Employee St. Wenceslaus Lawrence was able to get coffee at 9 a.m. without any problem.

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[10] But the Board has not considered only tangential interference to be of any of any moment. *See Golay*, 156 NLRB at 1261-1262 (in-plant work stoppage protected notwithstanding that it "*somewhat* curtailed production"); *Cambro Mfg. Co.*, 312 NLRB at 636 (noting that the in-plant work stoppage was protected because it caused "*little* disruption" of production to those who continued to work). (Emphases added).

Second, Respondent failed to demonstrate through competent, non-hearsay evidence that employees' presence in the cafeteria rendered its use by other employees unfeasible, much less impossible. Remarkably, Respondent presented *not a single witness*—even at the management level—to testify that he or she was deterred in any way from using the cafeteria. The only employer witness to offer direct testimony concerning interference with the use of the cafeteria was Gallardo. He testified:

> Q. Did anybody come up to you and complain that they couldn't watch the TV?
> A. No.
> Q. Did anybody come up to you and complain they couldn't get a seat?
> A. No.
> Q. Did anybody come to you to complain to you of any matter during the entire time you were down there? And when I say anybody, I'm talking about any employee.
> A. No.

(Tr. 1696.)

Instead, Respondent points to inadmissible hearsay suggesting that employees could not or chose not to use the cafeteria. (Respondent's Brief, p. 25) (Tr. 1542-1546; 2097-2098.) The ALJ correctly rejected that evidence. (D. 13, n. 16.) Respondent even attempted to argue during the hearing that an employee seen in the surveillance recording apparently eating food outside the cafeteria while talking to managers did so because he could not get inside (as opposed to any other number of likely explanations). (Tr. 2037-2039.) The ALJ correctly rejected that interference. (Tr. 2038-2039.) The fact that Respondent was constrained to argue its interference theory based on hearsay and speculative inferences—instead of through competent, admissible witness testimony as is normally done—reveals the evidentiary bankruptcy of its case.

Third, Trobaugh's decision to set up a temporary cafeteria in the private dining room does not establish that it was unfeasible to use the cafeteria on May 11, 2006. Trobaugh made her decision based on some complaints she claimed to have received from managerial employees. (Tr. 2096-2097.) The alleged complainants did not even testify. Trobaugh made no effort to discuss any accommodation with employees concerning a need to commence service of hot meals after 10.30 a.m. Had she done so, she would have learned that employees were trying to return to work. (Tr. 626; 695.)

Fourth, Respondent offered no evidence (even at the level of hearsay) purporting to demonstrate that the guests whose event Respondent relocated to a different room were inconvenienced or displeased with the change. It is equally likely that were entirely happy with the outcome.

In sum, Respondent failed to produce admissible evidence that the action of May 11, 2006 interfered with its use of its property in such a manner to render the work stoppage unprotected. The ALJ correctly determined based on the record that it did not.

4. Whether employees had adequate opportunity to present grievances to management.

The ALJ correctly ruled that at no time were the striking employees given an opportunity to present their grievances concerning the suspension of Reyes to management. (D. 15, L. 22-34). From the moment they entered the cafeteria, employees tried to convey their grievance to Respondent's managers. No manager with authority arrived. Trobaugh—the H.R. Director—obstinately refused to communicate with employees, although she was on the telephone busily instructing Samayoa to suspend them. Respondent's managers never

communicated that they would at least listen to employees' concerns, if not at that moment then at some time and place in the future.

An employer's willingness to listen to the grievance that has precipitated an in-plant work stoppage has been a key factor in determining how long the strike remains protected. *See Quietflex*, 344 NLRB at 1059 ("[A]lthough the Respondent did not have an established grievance procedure, the Respondent provided the employees with multiple opportunities to present their complaints to management."); *Cambro Manufacturing Co*., 312 NLRB 634, 635 (1993) (finding that stoppage was rendered unprotected at the moment the employees were "assured the opportunity, in full accord with the Respondent's open door policy, to meet in just a few hours with [the general manager] for further discussion of their complaints."); *Waco, Inc*., 273 NLRB 746, 747 (1984)(plant manager arrived, spoke with workers, and agreed to meet with them if they desisted in their work stoppage).

In response, Respondent indicates that it has an open-door policy that provides employees with the opportunity to bring their grievances to management. Respondent's Brief, p. 27. The ALJ correctly rejected the relevancy of such an open door policy based on *HMY Roomstore, Inc*., 344 NLRB 963 (2005), which is discussed below in subsection F. But assuming *arguendo* that Respondent's open door policy was adequate as a general matter, the fact remains that Respondent did not apply its open door policy to listen hear employees' grievance on May 11, 2006. That stands in stark contrast to *Cambro Manufacturing Co*., 312 NLRB at 635, where the striking employees were provided the opportunity to meet with management "in full accord with the Respondent's open door policy." 312 NLRB at 635.

Respondent makes two mutually inconsistent arguments to excuse its non-application of the alleged open door policy: first that its managers could not discuss Reyes' suspension

owing to confidentiality concerns, and second, that its managers did not actually know what employees were striking over. As to the first argument, there was obviously nothing that would have barred Coonley or Cook—or, in their absence, Trobaugh—from listening to employees' concerns regarding Reyes' discharge. Managers need not have shared confidential information in order to afford employees the opportunity to discuss their grievance.

Second, Respondent avers that it never knew the reason for the strike. (Respondent's Brief, p. 23.) That is false. Employees told Samayoa exactly why they wanted to speak to a manager. (Tr. 289, 306, 418, 422, 426.) While Trobaugh insisted she had no idea, Cook testified that Trobaugh told him on May 6, 2006 why the employees were in the cafeteria. (Tr. 1596.) Moreover, it is simply not credible as a matter of common sense that Respondent's managers never thought to ask the simple question: "what do these guys want?" Trobaugh admitted that her ignorance, if not feigned outright, was at least entirely unjustifiable:

> Q. [C]ertainly based on your experience, you didn't think that they were there because they were all enjoying coffee. Fair enough?
>
> . . .
>
> A. That's true. Obviously there was an issue.
>
> Q. And you assumed at the time that it was an issue concerning the workplace, correct?
>
> A. . . . I didn't know what the issue was. I knew that there were a lot of people down there from housekeeping that had punched in that were supposed to be at work and they were refusing to go back to work.
>
> Q. And that was a very unusual situation, wasn't it?
>
> A. Yes.
>
> Q. And that certainly caused you to wonder what they were [doing] down there, right?

A. Obviously there was some kind of issue about it. I didn't know what the issue was at the time.

JUDGE MCCARICK: And the question is basically is there some reason you didn't ask or ask one of your supervisors to ask?

THE WITNESS: I guess now looking back, yes, it would have been a great idea, but I don't remember why I didn't ask. I knew that they were upset about something, but I couldn't tell you that I asked specifically what it is that they want. I don't believe I did that.

(Tr. 2337.) Respondent cannot claim that it was unaware of the reasons for the work stoppage when its managers turned or willful blind eye. *See*, *e.g.*, *Serv-Air, Inc*, 162 NLRB 1369, 1377 (1967)("Particularly where the action of [the employer] which prevented further crystallization of the [employees'] intent was refusal to accept and discuss a grievance, uncertainties must be resolved against Respondent.").

The ALJ correctly found that, as long as management refused to provide employees with an opportunity to present their grievance, they continued to pursue an immediately protected interest. (D. 15, 1 34.) That circumstance stands in contrast to *Quietflex, Cambro Manufacturing* and *Waco*, where employees lost their protected interest in continuing the work stoppage once management agreed to meet with them.

5. Whether employees were given any warning that they must leave or face discipline.

Respondent argues that it gave employees sufficient warning that it was going to discipline them. But simply warning employees at the outset of a lawful protected work stoppage that they must leave or face discipline does not erase the protection afforded the stoppage. If that were the case, an employer could preempt employees' § 7 rights by warning employees to vacate the premises within the first minutes of the action. *But see Cambro*

Manufacturing Co., 312 NLRB at 634-645 (supervisor's initial demand that employees return to work did not mark the end of the protected phase of their work stoppage). That is not the law.

Instead, whether employees act reasonably in persisting in their work stoppage despite a warning must be viewed in light of other factors, including whether the employer simultaneously offered to discuss the grievance at a reasonable time and place. *See Cambro Manufacturing, Co.*, 312 NLRB at 636; *Waco, Inc*., 273 NLRB at 747. In the present case, Respondent gave the employees no fair chance to communicate their concerns regarding Reyes' suspension prior to suspending them. Given that employees continued to have an immediately protected interest in continuing their work stoppage, Respondent's warnings were premature and irrelevant.

6. <u>The duration of the work stoppage</u>.

The ALJ correctly found that employees did not persist in their in-plant work stoppage for a longer period of time than was permissible. *In Cambro Manufacturing, Inc*., the Board stated:

> The in-plant work stoppage here was peaceful, focused on several specific job-related complaints, and caused little disruption of production by those who continued to work. In such circumstances, the employees were entitled to persist in their in-plant protest for a reasonable period of time.

312 NLRB at 636 (emphasis added). The work stoppage here lasted for two and one-quarter hours from 8 a.m. until 10.15 a.m. At that time, employees endeavored to return to work but were rebuffed because Respondent had already been suspended them starting at 9 a.m. When their offer to return to work was rejected, they left peacefully at 10.40 a.m.

In *City Dodge Center, Inc*., 289 NLRB 194, *enf'd Roseville Dodge, Inc.,* 882 F.2d 1355 (8th Cir. 1989), the Board and the Court of Appeal found that workers engaged in protected activity when they stayed in the break room for four hours. In *Pepsi-Cola Bottling Co. of Miami, Inc*., 186 NLRB at 478, the protected work stoppage lasted "a few hours" and "did not extend beyond the employees' normal working hours." In *Golay & Co.*, the NLRB ruled that employees who "loitered or wandered about the plant for one and one-half to two hours while awaiting a decision on rectifying the illegal discharge" of a co-worker did not lose the Act's protection. 156 NLRB at 1262. In *Golay* the Board cited favorably its ruling in *American Manufacturing Co*., wherein it was ruled that employees had a protected right to remain peacefully in the plant approximately two hours after being ordered to return to work or leave the premises. *Golay*, 156 NLRB at 1262 (citing *N.L.R.B. v. American Manufacturing Co*. and *Nu-Art Employees, Inc*., 106 F.2d 61 (2nd Cir. 1939) (*enforcing as modified* 5 NLRB 443)).

Work stoppages that the NLRB has found unprotected involved situations where employees persisted in their in-plant stoppage for several hours *after* the employer offered to alternative channels for dialogue. *Quietflex* involved a twelve-hour work stoppage, during which the employer made several attempts to meet with the employees to discuss their concerns. 344 NLRB at 1059. *Cambro Manufacturing Co*. involved a four and one-half hour work stoppage; it was found unprotected after the employer informed the strikers that the general manager would meet with them at 7.30 a.m. to discuss their grievances. *Id.* Likewise, in *Waco, Inc*., the unprotected work stoppage lasted for between three and one-half to four hours with workers refusing to leave the premises after they were told that the general manager would meet with them. 273 NLRB at 747.

Respondent insists that at 9 a.m. it only suspended employees "pending investigation," but does not explain why the "pending investigation" modifier many any difference as a legal matter. It does not. Respondent admits it suspended employees "pending investigation" at 9 a.m. in order to regain custody of the Hotel cafeteria. It did not permit them to return to work at 10.15 a.m. It thereafter converted the so-called investigatory suspension into a full bore disciplinary suspension. The label Respondent chooses to affix to its suspension does not determine the protected nature of the underlying activity.

The ALJ found the duration of the stoppage not impermissibly long in light of Respondent's refusal to acknowledge their grievance. Employees' presence in the cafeteria continued to serve an immediately protected interest because Respondent provided them no outlet to channel their grievance. Once it became clear that any further protest would be futile as a means to communicate, employees left the cafeteria peacefully. The work stoppage was protected at all times.

7. Whether employees were represented or had an established grievance procedure.

The objective of the May 11, 2006 work stoppage was to communicate employees' collective grievance over Respondent's treatment of union activists such as Reyes. As unrepresented employees, employees had no effective mechanism through which to channel their concerns with any expectation of a fair process.

Respondent professes that it maintains an "open door policy" that serves as a grievance procedure, and it avers that it has resolved both collective and individual complaints under this policy. But Respondent fails to reckon with the fact that—just prior to the work stoppage in this case—it pointedly instructed employees that they could complain *individually* about

working conditions, but not *concertedly*. On May 5, 2006, Respondent issued a memorandum that prohibited employees from using their break time to address group concerns with management. It stated: "Breaks may be used, for instance, to discuss *your individual workplace concerns* with your supervisor, your manager or Human Resources." (Res. Exh. 2) (emphasis added). Respondent's point was clear: its door was not open to hearing collective employee grievances.

Furthermore, Respondent's self-serving examples of sporadic occasions in which it corrected a situation in response to a worker's complaint, Respondent did so only at its own choosing. At various times since the commencement of their organizing efforts, employees attempted to resolve collective grievances through dialogue with management. On January 30, 2006, employees gathered at the H.R. Department to discuss workplace issues. They found the door locked. (Tr. 130; 403-405.) In February 2006, Coonley met with employees, but failed to address their concerns. When Vargas offered his hand in a spirit of cooperation, Coonley boorishly refused to shake it. (Tr. 282.) In April 2006, employees expressed their concern regarding a lack of kitchen equipment. In response, Burciaga physically assaulted several of them. (Tr. 68-69; 217.) In February 2006, supervisor Erick Burkhardt ("Burkhardt") pointedly told employee Nathalie Contreras ("Contreras") that she had no right to be in his office to discuss workplace concerns. (Tr. 140.) In August 2006, Respondent retaliated against Contreras for violating its sexual harassment policy when she discussed with co-workers whether they had been the victims of sexual harassment—a group complaint that she intended to bring to management's attention. *See* Part II, section A, *infra*.

In *HMY Roomstore, Inc*., 344 NLRB 963 (2005), the Board drew a distinction between, on the one hand, an effective grievance mechanism that might mitigate the need for

protracted work stoppages and, on the other hand, the type of open door policy maintained by Respondent in this case. The Board wrote:

> We find it unnecessary to rely on the judge's finding that employees were not aware of the Respondent's open door policy. The judge found, and we agree, that the Respondent's policy had been used to resolve individual problems and not group complaints like those involved in this case. In any event, the existence of an established mechanism for presenting group grievances is only one factor to be considered in determining whether employees lost the protection of the Act by continuing an in-plant work stoppage too long.

Id. at n.2. Clearly, Respondent did not consider its open door policy to apply to group grievances over retaliatory discharges. The proof is that Respondent did not open its door to hear employees' grievance on May 11, 2006, but instead just waited them out. *Compare Cambro Manufacturing Co*., 312 NLRB at 635 (finding that the employer's agreement to meet with workers regarding their grievance in "just a few hours" if they would end their strike was an exercise of its open door policy). The ALJ was correct to conclude that the protected nature of the work stoppage does not depend upon the existence of an open door policy that Respondent refused to apply to the grievance at issue.

8. Whether employees remained on the premises beyond their shift.

The ALJ correctly found that employees did not remain on the premises beyond their shift. To the contrary, they left peacefully after Respondent rejected their request to return to work. In response, Respondent argues that employees who are on the clock during an in-plant work stoppage necessarily lose all protection of the Act. This theory lacks merit for two reasons.

First, the Board has specifically rejected the argument that an in-plant work stoppage loses its protection because some employees may be on the clock. In *Golay*, the trial examiner found that an employee's work stoppage was unprotected because he "punch[ed] in his time clock without intending to work." 156 NLRB at 1290. The trial examiner described this conduct as "contrary to accepted principles of morality to punch in with the expectation of being paid for work not to be done," an act which itself "justifies the refusal to reinstate." *Id.* at n. 23. The Board rejected this argument. It wrote:

> With respect to the other alleged misconduct occurring on the day of the strike, *i.e.*, punching in without intending to work and standing mute when polled as to working, these merely constitute the means by which an employee may strike, and, if the strike is lawful, do not warrant his discharge or bar his reinstatement.

Id. at 1263. The issue of employees being on the clock during an in-plant work stoppage has never been germane under *Quietflex*. In *Cambro Manufacturing Co*., the work stoppage was initially protected from 2.30 a.m. to 4.30 a.m., notwithstanding that employees were on the clock during those two hours. *Id.* It lost its protection only after 4.30 a.m. when the plant manager (having offered to meet with them at 7.30 a.m. under its open door policy) told employees to "return to work or to clock out."

Second, Respondent cannot argue that it suspended employees for "stealing time" because there is no evidence that Respondent relied even remotely on that consideration when it disciplined employees in May 2006. Indeed, Respondent did not discipline the employees who returned to work after 9 a.m. for "stealing time," despite that they were on the clock for

an hour while in the cafeteria. Whether employees were clocked in or not was not the issue in 2006. Respondent cannot create an *ad hoc* issue of it now.[11]

9. Whether the employees attempted to seize the employer's property.

The ALJ correctly found that the employees did not seize the Respondent's property. There was no evidence that employees prevented management or non-striking employees from using the cafeteria. They left peacefully after two hours and forty five minutes when Respondent refused to allow them to return to work. (D. 16, 40-44).

Respondent theorizes that employees "seized" the cafeteria because they stated in response to Respondent's warnings that they would not move. Respondent's analysis is flawed. Even crediting the testimony of supervisors who stated that various employees insisted "we're not leaving," those statements do not render the strike unprotected. Logic dictates that workers engaged in protected activity may declare to their employer that they intend to persist in that activity without such a declaration rendering the activity unprotected. Thus, inasmuch as workers had a right to persist in their strike through 9.00 a.m. when Samayoa unlawfully threatened to suspend them and through 9:06 a.m. when Taylor unlawfully threatened to trespass them, the fact that workers responded by insisting they would not budge is immaterial. Further, Respondent disingenuously misstates the facts when

[11] Respondent might have argued to the ALJ that back pay should be reduced by the time employees were on the clock and not working. But Respondent waived that argument by stipulating to the back pay specification at the outset of the hearing. Even that argument would have relied on Respondent having treated employees who returned to work after 9 a.m. the same as it treated employees who continued the strike. Since it did not dock pay from the former, it cannot dock pay from the latter.

it avers that it "required police assistance" to remove employees. There was no record evidence that the police did anything other than simply arrive. In fact, had Respondent caused the police to intervene by having any employee arrested, it would have been guilty of a further unfair labor practice in light of the peaceful and protected nature of the strike. Ultimately, employees left of their own volition when it was clear that dialogue with management was impossible in light of management's refusal to communicate anything but threats.

10. The reason for which the employees were ultimately disciplined.

Respondent's notice to each employee identifies "insubordination" and "failure to follow instructions" as the reason for the disciplinary action. (G.C. Exh. 11.) But the unsanitized testimony establishes that Respondent suspended employees because they refused to work, not because they refused to leave. Cook candidly testified that Trobaugh told him on May 11, 2006: "they were given the opportunity to come back to work and [ ] they refused, so they were suspended." (Tr. 1587.) That reason for discipline is unlawful under *Molon Motor and Coil Corp*., 302 NLRB 138 (1991), wherein the Board ruled that an employer unlawfully discharged employees for refusing to go back to work as opposed to refusing to leave their cafeteria. *Id.* at 139. In any event, even if the suspension was in response to a refusal to leave, it was premature and unlawful. the ALJ correctly so concluded.

Summary

Respondent's employees engaged in a protected concerted activity on May 11, 2006 when they gathered in the cafeteria to insist upon speaking to someone in management with authority to discuss the suspension of Reyes. They committed no act of violence or other

disruption that would cause their action to lose its protection. Respondent, meanwhile, turned a deaf ear to their entreaties, prolonging the period of time during the employees could continue their action. Respondent unlawfully threatened employees with suspension after about 45 minutes and then unlawfully suspended them after an hour. Employees attempted to return to work, but were rebuffed. They left peacefully after their effort to return to work failed. Under these facts, the May 11, 2006 action was protected at all times under § 7 of the Act. The ALJ was correct in applying the *Quietflex* factors to conclude that Respondent violated § 8(a)(1) by threatening and suspending the employees. The exceptions should be denied.

II. THE ALJ CORRECTLY RULED THAT RESPONDENT COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF SECTIONS 8(A)(1) AND 8(A)(3) OF THE ACT

A. The August 24, 2006 Discipline of Contreras

On August 24, 2006, Contreras hung four 30" x 27" posters in the cafeteria soliciting employees' input into whether they had been sexually harassed at work. In response, Respondent disciplined her for violating its sexual harassment policy. The ALJ correctly ruled that Respondent unlawfully disciplined Contreras for engaging in protected, concerted activity based on an application of *Meyers Industries*, 268 NLRB 493, 497 (Meyers I), *Meyers Industries*, 281 NLRB 882 (Meyers II) and *Wright Line*, 251 NLRB 1083 (1980).

In response, Respondent first argues that Contreras did not engage in protected activity. Respondent cites no cases in support of its position, but simply distorts the factual record. It states that Contreras "admittedly" never reported to Burkhart, her supervisor, that

guests were calling her offensive names. But instead of citing to the testimony of Contreras as one would expect, Respondent cites to the testimony of Burkhart, who obviously cannot make admissions for Contreras. (Respondent's Brief, p. 39).[12] Contreras' testimony was otherwise. She had complained to Burkhart after a customer, unsatisfied with his room, called her a "bitch." (Tr. 147.) Burkhart simply apologized to the guest. (*Id*.). Contreras again complained to him that a guest called her a "crack head." Burkhart thought it was funny. (Tr. 148.) After discussing her experience with co-workers Daniella Urban and Maribel Sanchez, who had similar complaints, Contreras placed the posters in the cafeteria to solicit employees to express their concerns. (Tr. 147)(JX Exh. 1-4.) Speaking to 15 to 20 employees on their break, Contreras told them "the reason why we were doing this was because we've had experiences with guests and with management being called names, and I thought that was very disrespectful and we'd like to know if anyone else has experienced the same problem because it's not fair that they could get away with it." (Tr. 156.) Based on these facts the ALJ's ruling that Contreras engaged in concerted activity for the purpose of mutual aid or protection is clearly correct.

Respondent next argues that it disciplined Contreras for legitimate reasons, citing *Park 'N Fly, Inc*., 349 NLRB No. 16 (2007) in support. In *Park 'N Fly, Inc*., the alleged

[12] The ALJ obviously discredited Burkhart's testimony. That was for good reason. Burkhardt admitted on direct examination that he had heard guests use "obscene words" directed at employees under his supervision. (Tr. 1449.) Then he changed his testimony, stating that he did not understand what the word "obscene" means. (Tr. 1449.) The ALJ queried him as to his educational credentials, and obviously satisfied himself that Burkhardt was able to understand the original question. (Tr. 1487.)

discriminatees called a female co-worker names such as "witch," "bitch," and "Godzilla;" further, the employer had strong evidence that they mailed a Playboy centerfold to her house. *Id*., Slip Op. pp. 3-6. The Board ruled that the employer's disciplinary response was lawful in light of its legitimate interest in preventing workplace sexual harassment. *Id.*

Respondent's argument is meritless. Unlike the employer in *Park N. Fly, Inc*., Respondent wielded its anti-harassment policy as a weapon to castigate Contreras for communicating with coworkers about working conditions. Trobaugh could not identify with credibility what portion of Respondent's policy Contreras violated. She settled on the paragraph that prohibits making unwelcome sexual advances, though she acknowledged that Contreras was not making sexual advances towards anyone. (Tr. 2308.) Burkhardt was equally at sea when ask to articulate how Contreras' action violated the harassment-free policy. He explained that if employee A tells employee B that a guest has called employee A "stupid," then employee A is in violation of the harassment policy. (Tr. 1489.) "It is in our policy that if anyone overhears something or says it's offensive to them, or even says anything offensive that anyone can hear, that's a zero tolerance." (Tr. 1489.) He then withdrew that explanation, deciding that what matters is the "audience." (Tr. 1491-1492.) He then changed that explanation and insisted that the words on the poster are "extremely offensive," or "some of them," or "pretty much all the words here." (Tr. 1492.)

It is absurd for an employer to argue that it may legitimately punish a woman who solicits the support of her co-workers to stop sexual harassment on the basis that she "harassed" those co-workers by telling them the offensive names she has been called. Trobaugh and Burkhardt obviously did not sincerely believe this patently ridiculous notion because they could not even explain it themselves. The ALJ was correct in finding that

Respondent's application of its harassment-free policy was a pretext for retaliating against Contreras' concerted effort to protest sexual harassment.

B. The June 2006 Warnings to Employees

The ALJ correctly found that Respondent unlawfully disciplined Simmons, Segunda Brentner ("Brentner"), Magallon, Isabel Salinas ("Salinas") and Joanna Gomez (Gomez) based on events arising out of the California Teachers Association ("CTA")'s conference held at the Hilton LAX on June 3, 2006. The decision should be affirmed for the reasons set forth in the Decision as well as based on the following analysis.

1. Respondent Violated Section 8(a)(1) by Enforcing an Unlawful Off-duty No-Access Rule Against Simmons

On June 3, 2006, Simmons attended the CTA during her break as an invitee of the CTA to discuss the May 11, 2006 work stoppage. (Tr. 454-455.) She spoke for ten minutes during her off-the-clock lunch break. Cook, her supervisor, learned that Simmons was there addressing the CTA. (Tr. 1558.) He went to the International Ballroom to look for her, but did not find her. Later, that day, he questioned her and told her she was not allowed to attend the CTA event in the International Ballroom while on break. (Tr. 1567.) A few days later, Cook issued Simmons the following warning: "On Saturday, June 3, 2006, you were seen in an inappropriate area of the hotel (International Ballroom) while on your break. The hotel's Team Member Handbook specifically states that it is a violation of company policy for being in an unauthorized or non-designated work or guest areas during scheduled work periods, or on your days off, without your supervisor's or management's specific instructions." (G.C.

Exh. 6.) Cook testified: "I told her that the California Teachers didn't ask management for permission for you to be in there, so she was there without permission. She was in an unauthorized area. Even though she was on break, it's unauthorized." (Tr. 1571.)[13]

Prior to May 4, 2006, Respondent's off-duty access policy stated:

> Only those team members scheduled for work are authorized to be on Hotel property. You should arrive on property no more than 30 minutes prior to the start of your shift, and must leave the property within 30 minutes from the end of your shift. The only exceptions to this rule are for situations in which you are picking up paychecks, or coming in at the request of your team leader or Human Resources.

(Resp. Exh. 27, p. 60.) After May 4, 2006, Respondent changed the policy to provide:

> ***Use of Location Facilities by Off-Duty Team Members***
>
> Team members who are "off duty" (i.e., time which a team member is not being compensated to perform job duties, or on a *bona fide rest period*) may not enter or remain in the Hotel's working areas, except for one of the following reasons:
>
> - Paycheck pick-up
> - Attendance at a department meeting (paid time)
> - Attendance regarding their employment (i.e. benefits, disciplinary meeting)
> - Attendance at a Hilton-sponsored team member function
>
> Team members are requested to provide advance notice to the Hotel's senior manager or his or her designee of attendance at any non-Hilton-sponsored function. Team members are asked to provide as much advance notice as possible for legitimate business reasons.

[13] There was no allegation that Simmons disturbed the CTA in its use of the space or that she interfered with the work of any on-duty employee. To the contrary, Simmons was an invited guest of the CTA and she attended in that capacity.

> While using the location's facilities, team members must conduct themselves properly. At all times while off duty and in working areas, team members may not distribute or circulate literature for any purpose, solicit or interfere with another team member's performance of job duties, or disturb guests or patrons for any reason.
>
> *This policy does not prevent off-duty team members from enjoying, as a guest, the Hotel's facilities such as the restaurant.* However, for security and other business reasons, team members are requested to provide advance notice to and obtain the approval of the Hotel's senior manager prior to such use.

(G.C. Exh. 5., Tr. 2313.) (emphasis added)

Section 7 of the Act protects the rights of employees to solicit support for their organizing efforts not only from co-workers, but also from the public at large. "The right of employees to distribute union literature during nonwork time and in nonwork areas is not limited to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations." *NCR Corp*., 313 NLRB 574, 576 (1993); *see also UCSF Stanford Health Care*, 335 NLRB 488, 535-536 (2001) *enfd.* 325 F.3d 334 (D.C. Cir. 2001), *cert denied; Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000).

The Board has recognized that off-duty employees have a protected right to access public areas of hotels to solicit union support provided they comport themselves in a manner consistent with the location's purpose and do not interfere with working employees. That principle was developed in the context of retail stores, where the Board drew the distinction between selling areas and non-selling areas for the purpose of analyzing prohibitions on off-duty solicitation. *See Marshall Field & Co.*, 98 NLRB 88, 92 (1952); *McBride's of Naylor Road*, 229 NLRB 1977. The Board subsequently extended this principle to hotels and similar

venues, finding that restaurants, public bars and similar areas of such establishment are akin to non-selling areas where employers cannot ban off-duty solicitation. *Crowne Plaza Hotel*, 352 NLRB No. 55, 2008 WL 1957899 (2008); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), *enfd as modified*, 414 F.3d 1249 (10th Cir. 2005), *cert denied; Santa Fe Hotel, Inc.*, 331 NLRB 723, 730 (2000); *Flamingo Hotel-Laughlin*, 330 NLRB 287, 288 (1999); *Dunes Hotel*, 284 NLRB 871, 875 (1987); *Barney's Club*, 227 NLRB 414 (1976).

Respondent revised its off-duty access policy for the apparent purpose of eliminating the prior policy's blanket prohibition against all off-duty access. Thus, the new policy distinguished between "working areas" (where off-duty access was permitted only for defined purposes) and "the Hotel's facilities such as the restaurant" (which off-duty employees may permissibly visit "as a guest.") Simmons was in compliance with the revised policy when she visited the International Ballroom because she was an invited guest of the organization that had license to use the space. She did not need to permission to engage in this protected activity.[14]

In view of the fact that Simmons' visit to the CTA event was permitted by Respondent's written off-duty access policy, Cook can only have enforced an unofficial rule when he insisted that "she was there without permission." (Tr. 1571). That rule is unlawful

[14] Trobaugh admitted that Simmons had a right as an off-duty employee to access events in the International Ballroom under her reading of the new policy. (Tr. 2319.) But she argued that the new policy also "requests" employees to obtain advance approval. But, of course, it merely requests, and does not require, such approval. It could not lawfully require advance approval because an employee is not required to obtain permission to engage in protected activity. *Brunswick Corp*., 282 NLRB 794, 795 (1987); *Cf. Lafayette Park Hotel*, 326 NLRB at 827.

because it prohibits access to an area of the hotel that is suitable for off-duty access when the employee is an invitee of an organization with a license to use the area. It is further unlawful because it was formulated on an *ad hoc* basis in response to Simmons' protected activity. *Libby-Owens-Ford Co.*, 285 NLRB 673 (1987); *Tri-County Medical Center*, 222 NLRB 1089 (1976). Inasmuch as the access prohibition violated Section 8(a)(1), the discipline resulting from it was similarly unlawful.[15]

2. Respondent Violated Section 8(a)(1) by Enforcing an Unlawful Off-Duty No Access Rule Against Brentner

Brentner attended the CTA conference as a guest of CTA to accept a donation on behalf of her co-workers while she was on her lunch break. In response, Respondent issued her a disciplinary warning that stated: "On Saturday, June 3, 2006, you were seen in an inappropriate area of the hotel (International Ballroom) during working hours when you were not on break." (G.C. Exh. 9.) Brentner refused to sign the warning because, as she told Respondent's agents, she entered the Ballroom while on break. (Tr. 766.) Respondent nonetheless issued the warning as written.

Inasmuch as Respondent would have disciplined Brentner for entering the Ballroom while on break as it did Simmons, the case is identical to Simmons' case with the same result. The case can also be analyzed as a Section 8(a)(3) violation, as shown below. Respondent would not have disciplined Brentner but for her protected activity.

[15] Respondent also discriminated against Simmons in violation of Section 8(a)(3) of the Act as discussed below.

C. Respondent Unlawfully Disciplined All Five Employees In Response to their Protected Concerted Activity In Violation of Sections 8(a)(1) and 8(a)(3).

Magallon was working in the area outside the International Ballroom on the morning of June 3, 2006. Salinas and Gomez were helping Magallon to clean ashtrays outside the Ballroom. Neither Magallon, Salinas nor Gomez entered the Ballroom. (Tr. 608; 898; 905.) Simmons and Brentner, as discussed above, did.

In response to rumors that some housekeepers had entered the Ballroom, Assistant Human Resources Director Michelle Romo ("Romo") launched a far-reaching investigation. She reviewed extensive surveillance imagery from cameras covering the hallways around the Ballroom. (Tr. 2201.) Based on that review, she identified moments at which the housekeepers appeared to move towards the side of the hallway where the Ballroom doors are located. Romo admitted that she could not see any housekeeper enter the Ballroom and she did not know how wide of a space was outside the view of the cameras. (Tr. 2179-2181.) She simply assumed they entered the Ballroom. Romo did not interview the employees as part of her investigation, although she admitted that it is customary to do so. (Tr. 2198; 2208).

On June 7, 2006, Samayoa issued identical disciplinary warnings to Magallon, Salinas, and Gomez, as well as Brentner, stating: "On Saturday, June 3, 2006, you were seen in an inappropriate area of the hotel (International Ballroom) during working hours when you were not on break." (G.C. Exh. 7, 9, 10, 18.) As discussed above, Simmons was disciplined for entering the Ballroom on her break.

In contrast to its treatment of all five employees, Respondent had freely permitted employees to enter the Ballroom on prior occasions to attend events staged by Amma the Hugging Saint and the Conscious Life Expo. Brentner attended an event called the Emerald Ball at the Ballroom in 2005. She stood next to Security Director Taylor for five to ten minutes. Brentner told Taylor that, since he was watching the dancers, she could too. (Tr. 764.) Taylor laughed. (Tr. 764-765.) He did not ask whether she was on break. (Tr. 772.) Her presence in the Ballroom was not investigated. (Tr. 772.)

Furthermore, Trobaugh testified about an incident where employees complained that other employees used restrooms that were off limits to employees. (Tr. 2296-2299.) Trobaugh testified that the use of these restrooms was in violation of a specific rule in the Handbook prohibiting such use. (Tr. 2314-2315.) She admitted that the offense was no different than the offense of accessing the ballroom in an off-duty status:

> Q. Now do you consider the fact that employees are using unauthorized bathrooms to be somehow different than walking into an unauthorized ballroom?
> A. No, I don't think that it's different.

But she did not investigate:

> Q. [I]sn't it fair to say in all honesty, in that situation, when that report came to you, you didn't think of it as an investigative matter, let's find out who it was that's going into those bathrooms?
> ….
> A. No, I didn't.

(Tr. 2317.)

In view of the foregoing facts, Respondent engaged in unlawful discrimination in violation of § 8(a)(3) of the Act when it disciplined its housekeepers. Under *Wright Line*, the General Counsel must show that protected or union activity was a motivating factor in the

Respondent's decision to take adverse action against discriminatees. The General Counsel satisfies this burden by proving that the discriminatees engaged in protected or union activity, that Respondent was aware of it, and that the Respondent demonstrated animus. The burden shifts to Respondent to demonstrate that it would have taken the same action absent the protected activity. *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB No. 33 (2006). The Respondent is required to show more than just that it had a legitimate reason for its actions. *Hicks Oils and Hickgas, Inc.*, 293 NLRB 84 (1989).

The ALJ found that Respondent knew that the housekeepers and Simmons had engaged in union activity, although he found that Respondent did not know that they engaging in union or protected activity on the particular day that they entered the Ballroom. (D. 25, L 45-48.) The former finding is correct, but the latter is not. In contrast to the ALJ's finding that Respondent was unaware that any employee had addressed the CTA (D. 25, L. 40), Cook testified that *he knew* that Simmons was addressing the CTA while she was in the Ballroom. (Tr. 1558.) He knew because Collera had told him so. (*Id.*) Given Respondent's knowledge that Simmons was addressing the CTA, its knowledge that the CTA is a labor organization, and its knowledge that Simmons was one of the leaders of the organizing efforts and the work stoppage, it is clearly evident that Respondent was aware that Simmons entered the Ballroom to solicit support for union organizing efforts. Indeed, Respondent states in its Brief that the CTA pulled its business out of the Hotel LAX in response to this protected activity. (Respondent's Brief, pp. 3 - 4.) To the extent that the ALJ's analysis relied upon a distinction between Respondent's knowledge of the discriminatees' union activity on June 3, 2006 versus their union activity in general, that distinction was in error.

Notwithstanding, the ALJ was correct in finding that Respondent cannot meet its burden of proving that it would have disciplined the housekeepers even in the absence of their protected activity. As the ALJ correctly found, three strong sources of evidence prove that it would not have:

First, Respondent launched a full scale investigation of the housekeepers—reviewing hours of surveillance video—simply based on some rumor that they had entered the Ballroom. In contrast, Trobaugh conducted no similar investigation when she received reports that employees were using public restrooms without authorization in contravention of the Handbook rules. Moreover, when Taylor saw Brentner watching the Emerald Dancers, he was unconcerned whether she was on the clock or not. Respondent's unprecedented investigation in response to rumors that the housekeepers had entered the CTA event when Simmons was addressing the audience constitutes strong probative evidence of discriminatory animus. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001); *Goodman Forest Industries*, 299 NLRB 49, 55 (1990).

Second, Respondent's failure to question the housekeepers prior to rushing to judgment as to what occurred—a further departure from Respondent's customary investigative practice—is further strong evidence of discrimination. *West Maui Resort Partners d/b/a Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003); *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *K&M Electronics*, 283 NLRB 279 n. 45 (1987). This is particularly striking given that the surveillance images are inconclusive as to whether the housekeepers entered the Ballroom and Respondent had no eyewitnesses. Respondent obviously rushed to judgment because it was adamant that this particular "misconduct" be quickly castigated.

Third, Respondent's disparate treatment of the Amma the Hugging Saint, the Emerald Ball and Conscious Life Expo events versus the CTA event demonstrates animus. Respondent avers that there is a meaningful distinction between the events because the organizers of the former allegedly agreed in advance with Respondent to permit employees to attend. That is a distinction without a difference. If Respondent's concern was that employees not "bother" clients, that concern was not present because the CTA obviously welcomed the employees.

The evidence shows that if the housekeepers had stepped into the International Ballroom on any other day to watch any other event, Respondent would have done nothing. It certainly would not have launched an unprecedented investigation—reviewing hours of surveillance video—simply based on some rumor that they had entered an authorized area. Respondent investigated and disciplined housekeepers because it was unhappy with what was going on inside the International Ballroom that day. That is the essence of a discriminatory discipline in violation of § 8(a)(3). Respondent violated the Act by issuing these disciplines.

///

CONCLUSION

For all the foregoing reasons, the ALJ's findings of fact and conclusions of law should be upheld. Respondent's exceptions should be denied.

Dated: January 30, 2009

Respectfully submitted

By s/Eric B Myers

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 1400, San Francisco, CA 94105.

On January 30, 2009 I served the document described as **CHARGING PARTY'S OPPOSITION TO RESPONDENT'S EXCEPTIONS** by electronic mail at the e-mail addresses indicated below and by placing a true copy thereof enclosed in a sealed envelope and depositing same with United Parcel Service for 2nd business day delivery addressed as follows:

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[X] (UPS) I am "readily familiar" with the firm's practice for collection and processing correspondence for UPS delivery. Under that practice, it would be deposited with the United Parcel Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 30, 2009 at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

s/Eric B. Myers
Renee Saunders